87-1256

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

1987-88 Term

HYDROGEN TECHNOLOGY CORP., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the First Circuit Court of Appeals err when it held, contrary to the holdings of the Sixth and Seventh Circuits, that the plaintiff must prove the inapplicability of exceptions to the Federal Tort Claims Act instead of the defendant having to prove their applicability?

2. Did the First Circuit Court of Appeals err when it invoked the "due care" exception, 28 U.S.C. 2680(a), to the Federal Tort Claims Act where there was no evidence that the F.B.I. was acting in the execution of a specific statute or regulation when it destroyed private property as part of an investigation?

3. Did the First Circuit Court of Appeals err when it invoked the "due care" exception, 28 U.S.C. 2680(a), to the Federal Tort Claims Act, where there was no evidence that the F.B.I. showed even minimal concern for the rights of the owners when it destroyed private property as part of an investigation?

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I. PRIOR DECISIONS

Jurisdiction of the Federal Court was based upon 28 U.S.C. 1331. There have been two prior decisions in this case. The Memorandum and Order on Cross Motions for Summary Judgment by the United States District Court in this matter, Civil Action No. 85-2073-Mc, was dated at Boston, Massachusetts, March 26, 1987, and is published at 656 F. Supp. 1126 (1987). The United States Court of Appeals for the First Circuit, No. 87-1284, affirmed on October 27, 1987. Both decisions appear in the appendix to this Petition.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The judgment sought to be reviewed was dated and entered October 27, 1987.

2. This court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit in this case by Writ of Certiorari under *28 U.S.C. 1254(1)*.

III. STATUTES

1. 28 U.S.C. 1346(b)

Subject to the provisions of chapter 171 of this title [Sections 2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2680(a)

The provisions of this chapter and section 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

The action below was brought by Hydrogen Technology Corporation (hereinafter "HTC"), the successor in interest to the Hartnett Hydrogen Generator Group which consisted of the investors, designers and the promoter of the development of a successfully tested hydrogen generator, against the Federal Bureau of Investigation (hereinafter "F.B.I.") pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, on May 20, 1985, Appendix filed in the First Circuit Court of Appeals (hereinafter "A") at Page 5. Cross motions for summary judgment were filed on August 26 and 28, 1986. A. 19, 44. The United States District Court for the District of Massachusetts granted the F.B.I.'s motion on March 26, 1987. The decision of the trial court was affirmed by the First Circuit Court of Appeals on October 27, 1987.

After several years of developmental effort a hydrogen generator was developed that would produce hydrogen for commercial use. A prototype was produced for the purpose of demonstrating that a technological breakthrough had been made. This new technology was expected to enable investors, designers and the promoter to realize profits from the production and sale of hydrogen.

The prototype was successfully tested on January 19 and 20, 1982, before several witnesses. A. 33. Thereafter, on March 22, 1982, the investors agreed to allow the generator to be taken to Purdue University for a reasonable period of time for further study. A. 34.

The prototype generator was transported to Indiana but was not delivered to Purdue University. Rather, the investor who insisted the generator be taken to Purdue kept the generator himself and filed two lawsuits in the United States District Court in Fort Wayne, Indiana, alleging (1) that money he invested in the development of the generator should be returned to him for various reasons including fraud (C.A. No. F82-0303) and (2) that he was the sole owner of the generator (C.A. No. F82-0387). On May 25, 1983 the Indiana District Court ordered the investor to return the hydrogen generator within fifteen (15) days. See Decision of the Trial Court at p. 2. The investor did not return the prototype as ordered.

Following a two-year investigation for possible wire fraud regarding the project, and, notwithstanding the U.S. Attorney's refusal to prosecute the developer of the hydrogen generator, the F.B.I. refused to close such investigation. In October, 1983 the F.B.I. obtained the prototype from an investor who knew where the generator was being stored. A. 415. This was done without authority from, or knowledge of, the majority of the other investors.

On February 16, 1984, the F.B.I. returned the generator to Massachusetts. When the shipment was received the investors first learned that the F.B.I. had destroyed it.

On September 19, 1984, the F.B.I.'s investigation was closed. There were no indictments or prosecutions. A. 429.

On or about November 9, 1984, HTC, as required, presented its claim to the appropriate federal agency. As no final disposition of the administrative claim was made by May 20, 1985, HTC elected to treat the lack of disposition as a denial of the claim, and brought suit pursuant to the Federal Tort Claims Act.

The F.B.I. took HTC's property as part of a "criminal investigation" and destroyed it subsequent to the U.S. Attorneys' having declined to prosecute anyone for want of credible admissible evidence of any criminal act. The availability of alternative methods of analyzing the sole existing prototype, not involving its destruction, show that the F.B.I.'s action in

destroying the generator constituted wrongful and/or negligent acts for which the government is liable, under the Federal Tort Claims Act, for damages.

The District Court found an exception to the Federal Tort Claims Act, (hereafter sometimes referred to as "the FTCA") 28 U.S.C. 2680(a) applicable, barring claims based upon acts of an employee of the government, exercising due care *in the execution of a statute or regulation.* The Court of Appeals affirmed. The F.B.I. did not exercise due care. It acted wrongfully and/or negligently in its examination and destruction of the sole existing hydrogen generator. In so doing it was not acting in the execution of any statute or regulation.

ARGUMENT

I. THE CIRCUIT COURTS OF APPEAL DIFFER AS TO HOW TO APPLY THE "DUE CARE" EXCEPTION FROM LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT

As the cases cited below indicate, there is a split in the circuits over how to apply the "due care" exception to the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.* This case exemplifies the split. Here, the First Circuit specifically disagreed with the Sixth (and Seventh) Circuit[1] as to the standard applicable to determine the threshold question of whether or not the United States is exempt from liability because of the "due care" exception. Had the case been argued in either the Sixth or Seventh Circuit the decision would have been in favor of plaintiff/appellant.

This case was dismissed on the grounds that the government is exempt from liability under the Federal Tort Claims

[1] Opinion at p. 15, n. 6. The First Circuit also held that the standard in determining whether the "due care" exception applies is federal law, not state negligence law. Opinion at 18, n. 8. The First Circuit specifically perceives a split with the 6th Circuit on this issue. *Id.*

Act, 28 U.S.C. 2680(a), which provides an exception for:

> "(a) Any claim based upon an act or omission, of an employee of the Government, exercising *due care, in the execution of a statute or regulation*. . . ." (emphasis added)

Section 1346(b) of Title 28, United States Code, authorizes suits against the Government for:

> loss of property . . . caused by the negligent or wrongful act . . . of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act . . . occurred.

A. The First Circuit erroneously decided that the exception applied even though there was no evidence that the F.B.I. was acting in the execution of a statute or regulation requiring or directing what it did when it destroyed plaintiff's hydrogen generator.

While it is true that it was uncontested that the government was acting under statute when it took possession of the hydrogen generator, and that it had a right to test it, that fact does not mean that the second part of the due care exception can be ignored by the First Circuit. That part requires that the government, to be exempt, must have acted with "due care, *in the execution of a statute or regulation*. . . ." (emphasis added)

The error in the First Circuit's holding is that it applies the "due care" exception without a showing that the acts of the F.B.I. were taken in the execution of a specific statute or regulation, requiring or directing the action complained about. Therefore, any time a government employee acted with due care, the First Circuit would hold that, as long as he was acting in the performance of his job, he was acting in the execution of a statute or regulation and the "due care" exception would apply. Such a result would render part of the FTCA meaningless. (See Section B below.)

In the instant case the trial court held, Decision at p. 9, that the statute under which the F.B.I. was acting was 28 U.S.C. 533. That section merely says, in relevant part, that "[t]he

Attorney General may appoint officials (1) to detect and prosecute crimes against the United States;. . ." When the F.B.I. destroyed the generator, it was acting under the general authority to investigate under Sec. 533, but it was not executing any statute or regulation under which it had any obligation to destroy the generator.

If it were so acting, then the exception *could* be applicable but absent a statute or regulation which required some particular action the F.B.I. was only conducting its normal business. As explained below, the "due care" exception was only meant to apply where the Complaint would call into question the validity of a statute or regulation under circumstances where the government employee was acting in accordance with instructions contained in that statute or regulation. *Powell v. United States,* 233 F.2d 851 (10th Cir. 1956).

B. The FTCA holds the government liable for injury in cases where the employees' acts are "wrongful" even if not negligent.

The FTCA holds the government liable for injury in cases where the employees' acts are "wrongful" even if not negligent. Since the FTCA requires that the employee be acting within the scope of his employment[2] in order for the government to be liable, it is difficult to imagine a circumstance where the government would ever be liable for "wrongful" acts if every time an employee acted without negligence within the scope of his employment, the due care exception exempted the government from liability.

Using the First Circuit's reasoning, all employees of the government are always acting in the execution of a statute or a regulation whenever they do anything in the performance of their jobs. Under this analysis there would never be governmental liability for any "wrongful" act. This result would follow because a plaintiff could never get beyond the threshold question as to acts of government employees (or agents) that were not negligent.

The word "wrongful" was added to the Act to cover "trespasses" which might not be considered strictly negligent.

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[2] 28 U.S.C. 1346(b).

Dalehite v. United States, 346 U.S. 15, 97 L.Ed. 1427, 73 S. Ct. 956 (1953). Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43-44. The "due care" standard is concerned only with negligence. The tension between the "due care" exception and the government's liability for "wrongful" acts requires this court's interpretation of Congressional intent.

C. The exception was intended to bar tests by tort action of the legality of statutes and regulations.

The meaning of this exception is that "[i]t bars tests by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33, 97 L.Ed. 1427, 1439, 73 S. Ct. 956 (1953).

The Sixth Circuit explained the exception in *Downs v. United States*, 522 F.2d 990, 994 (1975) when it said that it:

> immunizes the Government from liability for the actions of a Government employee who is exercising due care in implementing a government policy as set forth in a statute or regulation.

The instant tort action in no way questioned the legality of any statute or regulation, it merely charged the government with negligent and/or wrongful acts for which it sought compensation.

The hydrogen generator was destroyed by Dr. Fred Gornick, a professor at the University of Maryland, who was asked by the F.B.I. to test the generator. A. 417. The instructions given Professor Gornick were sparse, and he was neither told to destroy the generator nor required to do so by the nature of the information requested. There is no evidence that Professor Gornick asked whether he could or should destroy the generator during its examination.

No case has been found that interprets the meaning of the word "execution", but, the legislative history supports the interpretation that it means carrying out a directive or policy specifically stated in a statute or regulation. Professor Gornick was not "executing" a statute or regulation when he destroyed the generator.

While it is a given that all actions by employees (or agents) of the government are taken pursuant to some statute or regulation of the United States, there was no statute or regulation requiring or directing Dr. Gornick to destroy the generator. Therefore, holding the F.B.I. responsible for destroying the generator will not call into question the validity of any statute or regulation.

The government did not argue that the F.B.I. acted in the execution of a specific statute, either before the trial court or before the First Circuit. There is not a shred of evidence before either court that the execution of any specific statute was involved in the actions of Professor Gornick.

It was error for the First Circuit to hold that merely because the F.B.I. was acting pursuant to its generic statutory duties in this case, Opinion at 12, n. 5, that the destruction of the generator was done in the execution of a statute so as to trigger the "due care" exception.

D. The Sixth and Seventh Circuit Opinions differ from the First Circuit.

The Sixth Circuit has held that the government bears the burden of proof to establish that an exception to the Federal Tort Claims Act applies. *Carlyle v. United States*, 674 F.2d 554 (1982).

The Seventh Circuit has held the same. *Stewart v. United States*, 199 F.2d 517 (1952).

The First Circuit disagrees. Opinion at 15, n. 6.

In the instant case, not only did the government fail to submit evidence that the acts of the F.B.I. were taken *in the execution of a specific statute or regulation*, but the court decided the applicability of the 2680(a) exception without any evidence on which to rest its decision. The court simply held that the government had exercised due care and assumed that the fact that the plaintiff had not contested the initial authority of the F.B.I. to take possession of the generator meant that the F.B.I. acted, in subsequently destroying the generator, in the execution of a statute or regulation.

In *Carlyle* the Sixth Circuit held that "a plaintiff can invoke jurisdiction only if the complaint is *facially* outside the exceptions of Section 2680. 674 F.2d at 556. In other words, jurisdiction of the court is based on allegations of the complaint. The burden then shifts to the government to show that any exception applies. *Id.*

The Seventh Circuit long ago held that the burden is on the government to prove the applicability of the Section 2680(a) exception. *Stewart v. United States*, 199 F.2d 517 (1952).

If the Sixth or Seventh Circuits' decisions governed this case, the absence of evidence crucial to prove the applicability of the exception would mean that the government had failed to carry the burden of proof, and the District Court would have been reversed.

Notwithstanding the above, the complete absence of any evidence that the F.B.I. was acting in the execution of a specific statute or regulation means that there is no support for the First Circuit decision, unless the mere authority to initially take possession of the hydrogen generator for investigatory purposes somehow enabled the F.B.I. to destroy it unnecessarily without any resulting liability.

II. - THE FIRST CIRCUIT IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

The holding of the First Circuit is contrary to this Court's decision in *Hatahley v. United States*, 351 U.S. 173, 181, 76 S. Ct. 745, 752, 100 L. Ed. 1065 (1956) where it was said:

> 'Due care' implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.

Absent a specific statute or regulation requiring or directing the destruction of the generator, the government's agents or employees proceeded with complete disregard for the property rights of others.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this court grant Certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

NORMAN JACKMAN, ESQ.
Attorney for Petitioner

Dated: January 22, 1988

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1284

HYDROGEN TECHNOLOGY CORP.,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, *U.S. District Judge*]

Before

Campbell, *Chief Judge,*

Garth,* *Senior Circuit Judge,*

and Bownes, *Circuit Judge.*

Norman Jackman with whom *Marc A. Comras* and *Comras & Jackman, P.A.* were on brief for appellant.
Martha B. Sosman, Assistant United States Attorney, with whom *Frank L. McNamara, Jr.,* Acting United States Attorney, was on brief for appellee.

October 27, 1987

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* Of the Third Circuit, sitting by designation.

BOWNES, *Circuit Judge.* This appeal arises out of a criminal investigation by the Federal Bureau of Investigation (FBI) into possible wire fraud by one Ambrose J. Hartnett. Hartnett's alleged fraud lay in falsely representing to investors the properties and potential of a hydrogen generating device developed by Hartnett. In the course of its investigation, the FBI obtained a prototype of Hartnett's generator and dismantled it during a laboratory examination procedure. The dismantling process effectively destroyed the device. No criminal prosecution of Hartnett was ever brought. Hartnett's company, Hydrogen Technology Corporation (HTC) subsequently brought a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80, alleging that the government acted negligently in destroying the generator. The district court granted summary judgment for the United States and HTC appeals. Because we agree with the district court that the FBI acted with due care in conducting its investigation, we find the government immune under 28 U.S.C. § 2680(a) and affirm.

I.

The record on appeal consists largely of documents compiled by the FBI in the course of its investigation of Hartnett, including numerous FBI reports on interviews with HTC investors. These documents reveal that in the late 1970's, Ambrose J. Hartnett began promoting to investors a device known as the Hartnett Hydrogen Generator. This generator was represented to be a technological breakthrough which could provide an ultra-economical source of energy for home use. According to Hartnett, the core of the generator consisted of a chamber where highly heated water came into contact with what was described as a "catalyst" of metal shavings. As the result of a reaction between the metal shavings and water, hydrogen was produced and could be channeled out of the chamber. Part of the generated hydrogen would be bled out of the generator and used for home heating purposes; the remainder would be fed back into a burner and would in turn heat the reactor core, sustaining the high temperatures necessary for the separation of hydrogen from water. Thus, according to

Hartnett, the generator, once initially heated by external sources, would be self-sustaining and would require no further external input other than a small amount of water. Equipped with such a generator, Hartnett claimed, the average home could be heated for about twenty-three cents a month.

At the time Hartnett contacted potential investors, he advised them that the final version of the generator for home use would be completed in less than a year. He also told investors he had interested a French firm, Cruesot Loire Company, in the device, and that the French government had agreed to guarantee all loans and investments in the project up to $100,000,000. According to Hartnett, as soon as the final generator was completed, Cruesot Loire would pay $10,000,000 for worldwide manufacturing rights. Hartnett eventually persuaded a number of people to invest a total of $415,000 in the project. Approximately half of the investors were from the Fort Wayne, Indiana, area; the remainder resided in and around Chatham, Massachusetts, where the generator was being developed.

In return for their payment, investors received a percentage share of the project. Most investors paid $25,000 for a one percent share; others paid as much as $50,000 for the same share while still others received a five percent interest for $25,000. Hartnett also claimed at various times to have invested anywhere from $400,000 to $800,000 of his own money in the generator. Once the generator was sold to Cruesot Loire, Hartnett told investors, they would receive their share of the royalties from generator sales ($100 on each sale at a base price of $400-700 per unit). Hartnett also told some investors that they would be given managerial positions in the corporation overseeing generator sales, and would receive annual salaries ranging from $80,000 to $85,000.

The investors were sworn to secrecy concerning all aspects of the hydrogen generator project. Hartnett said he was extremely fearful of intervention by the government or oil companies who might want to steal his invention or otherwise prevent him from producing a device in direct competition with petroleum fuels. Because of these security concerns, Hartnett

told investors, he had not tried to obtain a patent in the United States. Only after investors had bought into Hartnett's venture were they permitted to visit the Chatham facility and view test firings of experimental generators.

Having been assured that development of the generator would be completed by the beginning of 1980, investors became anxious when in late 1980 and 1981 no final model was forthcoming. Hartnett proffered various excuses for these delays. He explained to some investors that he was encountering difficulty developing a nozzle for the Hydrogen burner and in obtaining ceramic material for the generator core. Others were informed that special materials, including silver, nickel, sapphire, and titanium were being incorporated into the reactor chamber in order to withstand the 7000 degree Farenheit temperatures Hartnett claimed were produced. At times Hartnett also referred to special grooves that were being machined into the chamber and which, along with oscillating magnets, created greater turbulence within the reactor and boosted hydrogen production. Some investors were shown a circular tube-shaped device which Hartnett claimed to be a "self-starter" under development. In the self-starter mechanism, a small quantity of hydrogen was allegedly mixed with an unidentified chemical compound; additional hydrogen and oxygen would be produced and burned off, generating sufficient heat to bring the core up to its operating temperature.

At no point was Hartnett gloomy about the ultimate workability of his generator. Indeed, in 1981, Hartnett told the investors that the prototype generator was working at 140% efficiency, and needed to be tuned down to 100% or else the device might "blow a building down." On the night of January 19, 1982, Hartnett staged a test firing of his final prototype, which he termed a great success. A scientific consultant hired by Hartnett observed the test firing and executed a sworn statement indicating that the generator functioned properly and produced hydrogen. In subsequent interviews with the FBI, however, the consultant said that the core temperature reached only 1600 degrees Farenheit, that the device was not self-sustaining in that it needed periodic refuelings with iron, and that Hartnett's generator could only be used for industrial, not

home heating, purposes. In spite of Hartnett's glowing predictions, the Hartnett Hydrogen Generator has never been produced commercially nor have manufacturing rights been sold to Cruesot Loire or any other entity.

Upon learning of Hartnett's promotional activities, the Fort Wayne, Indiana, FBI office in January of 1981 initiated an investigation into possible violations of the federal wire fraud statute, 18 U.S.C. § 1343. FBI investigators interviewed both Hartnett and the investors in his venture. Through the French police, the FBI also contacted Cruesot Loire Company and Francois Mayer, Hartnett's alleged business associate there. Mr. Mayer indicated that, contrary to Hartnett's claims, he had only spoken briefly with Hartnett on a technical matter related to the generator, and had never discussed financing or marketing the generator, let alone expressed an interest in purchasing rights to the device.

To evaluate the technological feasibility of the Hartnett Hydrogen Generator, the FBI contacted Dr. Fred Gornick, a Professor at the University of Maryland, who was affiliated with the United States Department of Energy and had a special background in the chemistry of hydrogen energy. Gornick informed the FBI that, while the production of hydrogen from iron and water is a well-known chemical reaction, many of Hartnett's claims were incredible. According to Gornick, no known substance can withstand temperatures of 7000 degrees Farenheit, so that even if the generator could produce such temperatures, it would simply melt. Hartnett's claim that his generator was self-sustaining made it, according to Gornick, a perpetual motion machine, in violation of the First Law of Thermodynamics. Overall, Gornick described the purported design, materials, cost, and output of the generator as "both inconsistent and ridiculous."

The FBI forwarded the results of its investigation to the United States Attorney's Office in Fort Wayne, but that office declined to prosecute Hartnett. In an April 1983 letter to the FBI, the Assistant United States Attorney in charge of the Hartnett case cited a number of factors mitigating against prosecution. First, the prosecutor thought there was insufficient

credible and admissible evidence to prove that Hartnett had defrauded investors. Second, there were currently ongoing civil lawsuits between investors and Hartnett in Indiana and Massachusetts. Through these lawsuits, the return of investors' money might be effected. Third, many of the investors in the generator were reluctant to come forward and admit that they had been duped by Hartnett. Indeed, some still believed that the generator might prove to be a viable energy producer. Finally, Hartnett was nearly seventy-five years old and in poor health. Following the declination of prosecution, the FBI in June of 1983 placed the Hartnett matter on "pending inactive status."

While the FBI was investigating Hartnett, dissatisfied investors were taking some steps of their own. When in March of 1982 Hartnett failed to carry through on a promised demonstration of the generator, the investors as a group agreed to permit one of them, Howard Scherer, to take the unit to Purdue University for testing. But Scherer did not deliver the unit to Purdue; instead he kept it, while trying to establish in United States District Court in Indiana that he was, in effect, the sole owner. Scherer did not succeed in court and, in spite of an order that he turn the generator over to the other investors, held on to the unit. Eventually, in the fall of 1983, after Scherer had fled Indiana, another Indiana HTC investor who knew the whereabouts of the generator voluntarily turned it over to the FBI Indianapolis office.

Seizing on its first opportunity to actually examine the Hartnett Hydrogen Generator, the FBI sent the unit to the FBI laboratory in Washington for testing. In its request for examination, the Indianapolis office stated that it wanted to know not only *if* the generator could produce hydrogen, but *how* it operated and whether it could serve as a cost-effective source of home energy. The request also stated a number of the claims made by Hartnett, including that the generator was self-sustaining, that core temperatures reached 7000 degrees Farenheit, and that the unit contained sapphire and gold linings, and asked the lab to evaluate whether they were true.

The lab examination was conducted by Dr. Fred Gornick, the same chemist who had earlier provided advice to the FBI on the scientific feasibility of some of Hartnett's claims. At no point in his examination did Gornick fire up the generator to try to produce hydrogen. Rather, assuming that the device could produce some hydrogen so long as it combined heated water and iron, Gornick dismantled it in order to see how it was constructed and whether it could live up to Hartnett's many claims. Inside the generator's thick steel shell, Gornick found a three-inch layer of conventional asbestos insulation surrounding a steel core. The reactor chamber itself was intricately machined, but contained no exotic materials, only two cubic feet of iron filings. As claimed by Hartnett, the core did have a device for bleeding off hydrogen to a burner which could in turn heat the reactor chamber. There was, however, no self-starter and the initial heating of the unit was accomplished by a common 110 volt electric heater.

Gornick determined that the generator could have produced hydrogen, but described it as an "elaborately constructed device for carrying out a simple well known chemical reaction which could be performed about as well or better in a heated pipe full of iron briquets." The generator was not self-sustaining, Gornick said, because iron was in no sense a "catalyst," but rather a reactant which would become spent and have to be replaced frequently.[1] Indeed, according to Gornick's calculations, even assuming complete conversion of iron and total efficiency, the generator would require nine tons of iron filings in order to provide enough energy for a single home for a year.[2]

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[1] A catalyst is a substance that causes or accelerates a chemical reaction between other substances without itself being affected. Webster's Third New International Dictionary 350 (1971).

[2] Gornick's report did note that the generator might have made part of a cycle for *industrial* hydrogen production, if it were used in conjunction with a blast furnace for restoring the spent iron. The Hartnett Hydrogen Generator contained no such restoring mechanism, however, and at any rate had always been promoted as a source of home energy, not industrial hydrogen production.

Following the FBI laboratory examination, the dismantled and now unusable prototype generator was returned to the Massachusetts HTC investors in February of 1984. No indictments or prosecutions were brought and on September 19, 1984, the FBI closed its investigation. In accordance with the procedural requirements of the FTCA, 28 U.S.C. § 2675(a), HTC presented its claim for $50,600,000 in damages to the FBI in November of 1984. When the FBI failed to act on the claim, HTC instituted this lawsuit.

The government claimed immunity under three provisions of 28 U.S.C. § 2680: first, because the FBI acted with due care in carrying out its investigation, it was protected under the first part of section 2680(a);[3] second, the FBI's decision to dismantle was a discretionary act which rendered the FBI immune from liability under the second part of section 2680(a); third, the FBI's laboratory examination fell within section 2680(c) as a protected detention of goods by a customs, excise of "other law enforcement officer."[4]

On a stipulated record, the district court considered cross-motions for summary judgment on the issue of governmental immunity. In an opinion now reported at 656 F. Supp. 1126 (D. Mass. 1987), the court found section 2680(c) inapplicable, since the examination was conducted by the FBI and was unrelated to any customs or excise function. Nevertheless, the court granted summary judgment for the government because it

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[3] 28 U.S.C. § 2680(a) provides that:

The provisions of this chapter and section 1346(b) of this title shall not apply to . . .

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[4] 28 U.S.C. § 2680(c) provides that:

The provisions of this chapter and section 1346(b) of this title shall not apply to . . .

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of goods by any officer of customs or excise or any other law enforcement officer.

found that the FBI acted with due care within section 2680(a). HTC seeks to have that ruling overturned.

II.

The Federal Tort Claims Act constitutes a limited waiver of sovereign immunity for certain negligent or wrongful acts by government employees acting within the scope of their employment. Congress passed the Act out of a growing recognition that the government owed an obligation to pay damages for the harm caused by its employees' misfeasance, and out of frustration with the prior private bill remedy. *Dalehite* v. *United States,* 346 U.S. 15, 24-25 (1953); *D'Ambra* v. *United States,* 481 F.2d 14, 16-17 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973). The prerequisite for liability under the Act is a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *see Zabala Clemente* v. *United States,* 567 F.2d 1140, 1143 (1st Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978).

There are, however, many exceptions to the FTCA, *see* 28 U.S.C. § 2680, two of the most prominent of which are discretionary government acts, even if undertaken negligently, 28 U.S.C. § 2680(a); *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797 (1984), and acts where there is no negligence, even if an individual would have been liable without fault. 28 U.S.C. § 2680(a); *Laird* v. *Nelms,* 406 U.S. 797 (1972). *See D'Ambra,* 481 F.2d at 17. Here, the first and most fundamental obstacle faced by appellant is the government's assertion that it is immune because the FBI conducted its investigation with due care.[5]

[5] Section 2680(a) refers to "due care . . . in the *execution of a statute or regulation.*" 28 U.S.C. § 2680(a) (emphasis added). As the district court correctly noted, the FBI has a duty under 28 U.S.C. § 533 "to detect and prosecute crimes against the United States." Appellant has not contested that the FBI was acting pursuant to its statutory duties in this case, but has limited its claim to the FBI's alleged lack of due care.

Because the "application of the FTCA is a federal question," *D'Ambra,* 481 F.2d at 18, we must look initially to federal law to determine whether an exception to the FTCA applies.

HTC asserted in district court that Massachusetts law ought to govern the question of due care since the investors and plaintiff corporation are residents of Massachusetts and because the impact of the alleged negligence would be felt in Massachusetts. Apparently seeking to comply with 28 U.S.C. § 1346(b), HTC argued that at any rate the law of the District of Columbia (where the allegedly negligent acts occurred) was substantially similar. Because the government did not contest the point, the district court assumed that Massachusetts law applied or that, if District of Columbia law applied, it was not substantially different.

The district court's decision to use state law in applying the section 2680(a) exception was mistaken because it misperceived the structure of the FTCA. The waiver of sovereign immunity for federal tort claims is a purely statutory one and extends only so far as Congress intended it. Since the exceptions set out in section 2680 define the limits of that statutory waiver, they must be construed as a matter of federal, not state, law. *See United States* v. *Neustadt,* 366 U.S. 696, 705-06 (1961) (determining that federal, not state, law governs whether a claim for negligent misrepresentation is excluded by § 2680(h)); *Jimenez-Nieves* v. *United States,* 682 F.2d 1, 3-4 (1st Cir. 1982) (citing *Neustadt*); 1 L. Jayson, *Handling Federal Tort Claims § 241 (1987).* Indeed, because 28 U.S.C. § 1348(b) provides that federal courts shall have jurisdiction over FTCA claims *"subject to,"* inter alia, section 2680, the exceptions found in that section define the limits of federal subject matter jurisdiction in this area. *See Dalehite* v. *United States,* 346 U.S. 15, 24 (1953) (where discretionary function exception of section 2680(a) applies, district court had no jurisdiction over cause of action); 1 L. Jayson, *supra,* at § 193.03. Permitting state law to control the breadth of the exceptions to the FTCA would mean that federal subject matter jurisdiction might vary from case to case depending on particular state choice of law rules for torts; this would be unacceptable.

In a case like this, where the substantive claim sounds in state negligence law and where federal law is probably similar, we understand that there is a temptation to use state law in applying the due care exception of section 2680(a). Nevertheless, the appropriate course is to use a federal standard. Only if section 2680(a) immunity is found lacking should state negligence law be considered under the guise of section 1346(b).

In applying the federal standard for due care under 28 U.S.C. § 2680(a), "we refer, as did the Supreme Court in *Neustadt*, to the Restatement (Second) of Torts, and to federal cases construing the exception." *Jimenez-Nieves*, 682 F.2d at 4 (construing the § 2680(h) exception). The relevant question is one of reasonableness. Restatement (Second) of Torts § 282 (1965) ("negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"). The district court followed the wrong law, but arrived at the correct test: "considering the status of defendant (law enforcement agency) and that of plaintiff (subject of investigation) what would the reasonable law enforcement agency have done under the circumstances?" We pay particular attention to the reasonableness calculus proposed by Restatement (Second) of Torts (1965) which requires the FBI to have employed reasonable knowledge of human qualities and of the law, *id.* at § 290, and to have recognized and considered the risk to HTC in carrying out its laboratory examination. *Id.* at § 289. Negligence is determined by balancing the magnitude of that risk against the potential public utility of the FBI's examination of the generator. *Id.* at § 291-93.

The government argues, and the district court below found, that a reasonable law enforcement agency, under the circumstances existing in late 1983, would have subjected the Hartnett Hydrogen Generator to laboratory scrutiny, even if it meant dismantling the device and effectively destroying it. HTC claims that, to the contrary, the only reasonable course would have been a test firing; under no circumstances, HTC says, should the FBI have dismembered the only existing

prototype of the generator. HTC marshals a number of arguments on its behalf, none of which we find persuasive.[6]

First, HTC relies heavily on the fact that the United States Attorney's Office declined prosecution of Hartnett *before* the FBI's renewed investigation led to the destructive examination of the generator. Clearly, the fact that a prosecutor in April of 1983 decided against pursuing criminal charges has some logical bearing on the reasonableness of the FBI's decision in late 1983 and 1984 to continue its investigation. But that is not the question before this court. HTC has stated, implicitly in its brief and explicitly in oral argument, that it is not challenging the FBI's decision to continue investigating Hartnett after prosecution was declined nor is it challenging the FBI's general decision to test the generator in some way, decisions which HTC acknowledges are discretionary functions immunized by 28 U.S.C. § 2680(a). Rather, HTC's negligence claim is limited to the FBI's selection of a destructive examination procedure as opposed to a simple testing firing, once the decision to examine the generator in some way had been made. For purposes of selecting a testing *method,* however, the declination of prosecution is simply irrelevant. Whether or not

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[6] HTC also suggested at oral argument that it is the government's burden to show that a particular exception to the FTCA applies, and we recognize that some courts seem to have adopted this approach. *E.g., Carlyle* v. *United States,* 674 F.2d 554, 556 (6th Cir. 1982) ("after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by § 2680," the burden to prove applicability of specific provision falls on the government). As we have discussed above, however, when an exception to the FTCA applies, sovereign immunity is still intact and federal courts have no subject matter jurisdiction to entertain an action. It is well-established law that such jurisdictional defenses cannot be waived by the parties and may be raised for the first time on appeal or even raised by a court sua sponte. *United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513-14 (1940); *Eisler* v. *Stritzler,* 535 F.2d 148, 151 (1st Cir. 1976); *Leonhard* v. *United States,* 633 F.2d 599, 618 n.27 (2d Cir. 1980) ("It is immaterial that the defense of sovereign immunity was not expressly raised by the agencies below nor pressed by them on this appeal. Since sovereign immunity is a jurisdictional defect, it can be raised at any time, and indeed by a court of appeals on its own motion.") (citations omitted), *cert. denied,* 451 U.S. 908 (1981). *See also* 1 L. Jayson, *Handling Federal Tort Claims* § 193.03 (1987); 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1393 (1969 & Supp. 1987).

a prosecution was pending, the FBI, having decided to examine the generator, would need to do so in the way best calculated to reveal information which would determine whether Hartnett had made fraudulent claims. And the FBI's need for such information would in no way be lessened by the fact that the government had declined prosecution. [7]

Second, HTC argues that test firing the generator offered to the FBI a better suited examination procedure which would have revealed all the information necessary about the capabilities of Hartnett's generator. Relying on *Downs* v. *United States,* 522 F.2d 990 (6th Cir. 1975), HTC claims that the FBI's decision to ignore this alternative and select a more intrusive form of testing constitutes actionable negligence. In *Downs,* the question was whether the government could be held liable when FBI agents at the scene of a hijacking incident refused to negotiate with the hijackers and instead fired upon the plane, prompting one of the hijackers to shoot two hostages. After first holding that the FBI's action was not immunized under 28 U.S.C. § 2680(a) as a discretionary function, the Sixth Circuit went on to find the "due care" exemption of section 2680(a) equally inapplicable. The court reasoned that the FBI had a "better-suited alternative," namely, playing a "waiting game" with the hijackers, and thus found that the FBI had acted negligently under Florida tort law. 522 F.2d at 1002. The court also emphasized that the FBI agents had violated FBI policy and disregarded the substance of FBI handbook guidelines in handling the incident. *Id.*

While we agree with the Sixth Circuit that an analysis of "better-suited alternatives" is a useful tool for evaluating negligence, we note at the outset that this case is clearly distinguishable from *Downs* in that there has been no allegation

[7] Indeed, as noted above, the declination of prosecution was based, in part, on insufficient admissible evidence. A reasonable FBI agent might thus logically have concluded that, in light of the declination, an especially comprehensive examination was necessary in order to unearth all available evidence that might lead to prosecution.

that any FBI guideline was violated.[8] Further, we are not convinced that test firing would have provided a viable alternative. Even if carried out over a prolonged period and carefully monitored, a test firing at best would have revealed whether the generator could produce hydrogen and whether it was self-sustaining for the test period. But, contrary to HTC's assertions, those were not the only questions confronting the FBI. Indeed, according to the FBI's expert, the production of hydrogen from hot water and iron is a relatively simple procedure which can be accomplished without any elaborate mechanism. The real issue to be resolved by the FBI laboratory examination was whether Hartnett's generator was such a simple device or whether, as Hartnett claimed, it was a technological breakthrough composed of exotic materials and intricate machining.[9] Prior to opening up the generator, the FBI could not even have calculated the efficiency of Hartnett's invention—another critical issue—because they did not know how much iron it contained, nor whether it contained any other fueling agents. Perhaps the FBI should have test fired the generator before dismantling it, but the record belies the assertion that test firing would have been an adequate *alternative*.

HTC's third argument is that the FBI acted negligently in dismantling the generator because in so doing they destroyed its evidentiary value. Essentially, HTC argues that a test firing of the generator would have been a crucial part of the defense were Hartnett ever to have been prosecuted. Citing cases like *California* v. *Trombetta*, 467 U.S. 479 (1984), and *Brady* v. *Maryland*, 373 U.S. 83 (1963), HTC claims that the government's failure to preserve intact this demonstrative evidence

[8] As noted above, we also disagree with the *Downs* court to the extent state negligence law and not federal law was used to determine the applicability of the § 2680(a) exception.

[9] The Indianapolis FBI's request for examination reads in part:

> The defense might state that investors were told this item produces hydrogen gas, which it may, and that this hydrogen gas can be used to heat your house, which it may; however, the real question is did they invest $25,000 and $50,000 into a simply [sic] hydrogen gas production device deliberately made elaborate and complicated as a rouse [sic] to secure their investment.

constitutes actionable negligence.[10] Like HTC's second argument, however, this claim is premised on the notion that the only issue confronting the FBI was whether the generator could produce hydrogen gas. As we have already stated, our review of the record indicates that, to the contrary, the real issues involved were how the generator was constructed and of what it was made. It goes without saying, then, that a dismantling of the generator was a reasonable, even necessary, element of the investigation. Further, such a dismantling would not and did not necessarily destroy the exculpatory value of the physical evidence. To the extent the defense might have wanted to show that the generator could produce hydrogen, the government's own report concedes that it could have, and the defense would have been free to have the dismantled generator examined by its own experts. And if the defense wanted to show how the generator was constructed, the physical evidence was still intact after the examination and available for presentation in court.

While we are mindful of the potential danger to individual rights when an investigating arm of the government seizes and dismantles private property in the course of an ultimately fruitless endeavor, we are unable to find anything in the record which indicates that the FBI acted other than with due care. Following the Restatement balancing approach, we find that, because the fraud allegations against Hartnett turned largely on how the generator was constructed, the potential utility in dismantling it was high. Moreover, if the generator were really the technological breakthrough that it was claimed to be, HTC, having already developed a design, could easily have built a new prototype generator. Thus the risk of permanent harm was low. The inescapable conclusion is that the FBI did not act negligently and that the government is immune under 28 U.S.C. § 2680(a).

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[10] Additionally, HTC urges in its brief that the government's actions in destroying allegedly exculpatory evidence "violated fundamental Due Process requirements." Since no criminal case has been brought and Hartnett is not a party to this case, it is not clear whose constitutional rights have allegedly been violated or how they have been violated. At any rate, appellant's constitutional argument was not raised in the district court and is not properly before us now. *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979).

The normal rule is that issues of negligence are not to be resolved by summary judgment. 6-Pt.2 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.17[42], at 56-946 (1987); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2729, at 194 (2d ed. 1983). This rule is premised on the fact that negligence and reasonableness are particularly elusive concepts, and that parties therefore should not be deprived of an opportunity to put all their evidence before a jury for factual evaluation. *See, e.g., Gauck* v. *Meleski,* 346 F.2d 433, 437 (5th Cir. 1965). Here, however, as the district court found, 656 F. Supp. at 1126, the parties have agreed that there is no dispute over material facts. Indeed, appellant has asserted that, even if summary judgment for the government was reversed, the only additional evidence it would seek to introduce is on the issue of damages. And, appellant has no right to a jury trial. *See* 28 U.S.C. § 2402. Even if this case came on for a full trial, then, the same decisionmaker would determine the same issue of negligence on the same evidence. We think that the district court's summary adjudication in this case was thus proper. *See Taylor* v. *Gallagher,* 737 F.2d 134, 137 (1st Cir. 1984) ("Summary judgment is inappropriate in negligence actions only if genuine issues of material fact exist or if reasonable jurors could draw different inferences from agreed facts."); *Dobb* v. *Baker,* 505 F.2d 1041, 1043-44 (1st Cir. 1974) (upholding summary judgment for defendant where "there was nothing to support a finding of negligence").

Because we find that the due care exception to the FTCA applies, it is unnecessary to reach the other claims of statutory and common law immunity raised by the government.

Affirmed.

Costs awarded to appellee.

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Adm. Office, U.S. Courts—Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1284

HYDROGEN TECHNOLOGY CORP.
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA
Defendant, Appellee.

JUDGMENT

Entered: October 27, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messr. Jackman and Ms. Sosman]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HYDROGEN TECHNOLOGY CORP., *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	Civil Action No. 85-2073-Mc

MEMORANDUM AND ORDER
on
CROSS MOTIONS FOR SUMMARY JUDGMENT

March 26, 1987

Mc NAUGHT, D.J.

This action came to be heard on cross motions for summary judgment. This is an action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 wherein the alleged owner of a "hydrogen generator" seeks damages for trespass to or negligent, reckless mishandling of the object in the course of a criminal investigation. It is claimed that the device was rendered useless and irreparable when, at the FBI Laboratory in the District of Columbia, it was dismantled in the course of examination. Plaintiff and defendant agree that there is no dispute over the material facts. They each assert that on those facts they are entitled to judgment on liability. If plaintiff is right, an assessment of damages should follow. If the government is correct, the case is over.

Sixty-one (61) joint exhibits were submitted by the parties to the court at the hearing on these motions, preceded by a "table of contents" type of description of each of them. The trip through this wonderland of paper has been less than fascinating. I am satisfied now that if the parties had tried, they could have assembled an agreed statement of undisputed facts

and saved the Court a great deal of time and effort. The statement of facts that follows is taken partly from the plaintiff's submissions and partly from the government's.

One Ambrose Hartnett interested a number of people in investing a total of $415,000 to develop the generator in question. A prototype was developed and demonstrated to the group here in Massachusetts. On March 22, 1982 the investors agreed that one of them, a Howard Scherer, could take it to Purdue University for study. Seven of the investors were from Indiana. In the meantime, in 1981, the FBI initiated an investigation into possible wire fraud violations By Mr. Hartnett. Scherer did not deliver the unit to Purdue University. He kept it and he then filed two actions at law in the United States District Court seeking a judgment to the effect that he was the sole owner of the unit in one of them, and asking for return of his investment ($25,000) by reason of fraud in the other.

On May 25, 1983 Scherer was ordered by a federal judge to return the unit to the defendants within 15 days. He did not do so. His cases were dismissed the following month. The United States Attorney for the Northern District of Indiana declined to prosecute for "insufficient credible evidence", "parallel lawsuits" in Indiana and Boston in the Federal Courts wherein the issue of ownership, the viability of the device and the return of investors' funds might be resolved. He also cited the age and poor health of Mr. Hartnett as a reason for his action.

In the fall of 1983 one Les Stoller, an Indiana resident, and an investor who knew where the generator was stored, turned it over to the F.B.I. The Indiana office of the Bureau sent the machine to the Laboratory for an analysis of its composition and capabilities. A Doctor Fred Gornick, a professor from the University of Maryland, issued a report dated May 29, 1984. Plaintiff, in its submission, emphasizes those portions of the report favoring its view of this dispute, and the government emphasizes the conclusion of Dr. Gornick that the machine was nothing but an elaborate device for carrying out a simple chemical reaction that could be done as well in a "heated pipe full of iron briquets". What really matters is that damage was

done by reason of the dismantling and examination. The dismantling and examination were ordered because the F.B.I. was carrying out a criminal investigation, and despite the characterization of Document 51 by plaintiff's counsel as proof that there was "no credible evidence of fraud" (a phrase taken from the letter of the United States Attorney for the Northern District of Indiana) there is much more in the joint exhibits to justify the continued investigation by the Agency. Exhibits 4, 7, 14, 17, 19, 20, 26 and 29.

The government contends that two exceptions to the Federal Tort Claims Act come into play, 28 U.S.C. § 2680(a) and § 2680(c). The government also argues that if there was a trespass to plaintiff's property, the trespass was, at common law, privileged.

Section 2680(c) was dealt with first in the government's brief and in the plaintiff's argument; hence I shall deal with it before coming to the "discretionary function" exception of Section 2680(a).

The Tort Claims Act does not apply to "any claim in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise *or any other law enforcement officer.*" (Emphasis supplied.) The United States asserts that the Supreme Court has interpreted this section broadly, holding that *any* claim arising out of the detention of goods, inlcuding negligent handling or storage of detained property is barred. Defendant cites *Kosak* v. *United States,* 465 U.S. 848 (1984), and *Bielass* v. *New England Safe System, Inc.,* 617 F. Supp. 682 (D. Mass. 1985) in support. These cases, however, involved goods left with or detained by the Customs Service. The decision in *Formula One Motors, Ltd.* v. *United States,* 777 F.2d 822 (2d Cir., 1985) was concerned with a vehicle seized by DEA agents, and effectively destroyed by disassembly in a search for narcotics. Circuit Judge Newman, in the opinion, recognizes that one might interpret the exception to mean that "other law enforcement officers" are covered "only when their actions are in aid of customs or excise functions of the Government", but calls attention to the fact that "several

circuits have ruled, with scant discussion, that section 2680(c) applies to detentions beyond the context of customs duties and taxes . . ." At page 823. He then recognized the kinship of the activity by the DEA agents to the customs function, noting that the car had been shipped from abroad and was still in its shipping container. It is clear to me that the *Formula One Motors* decision does not cover the fact situation in the case at bar. Circuit Judge Oakes, concurring, wrote that if there were no nexus between customs activity and the activity complained of, he would hold that section 2680(c) did not bar recovery. That view makes sense to me, and in the absence of a definitive guideline in this circuit, I too am of the opinion that "those cases applying the exception to law enforcement officers acting out of the excise/customs context....to be wrongly decided." At page 825.

Is this claim barred by 28 U.S.C. § 2680(a)? This subsection provides that the Act does not apply to any claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." I have stated above that I agree with the government's contention that there is no question but that the taking and dismantling of this object was a part of the investigation into possible wire fraud in which investors may have been bilked. That conclusion, however, does not conclude the inquiry. What was done upon acquisition of the machine was done *deliberately,* to see whether the unit was legitimate. Notwithstanding plaintiff's claim, this was not a negligent or careless act as negligence is defined in the Commonwealth of Massachusetts. (Plaintiff asserts that "Massachusetts negligence law" should control. "The law in the District of Columbia is essentially similar. . . . . There is no overriding interest in the application of the law of the District of Columbia. It is merely coincidental that the F.B.I.'s Laboratory is located there. The primary impact of the conduct alleged is felt in Massachusetts." We assume that Massachusetts law applies, or that, if District of Columbia law applies, there is no

substantial difference in the two, since the point is not contested by defendant.) Plaintiff defines "negligence" as breach of a duty causing damage, and continues on: "The standard of care owed is that of a person of ordinary prudence exercising reasonable care under the circumstances". It is then contended that, while the government's decision to investigate may have been the exercise of a discretionary function, "further actions are not immunized". Somewhere, there has been a jump in logic.

One looks to the relationship, under Massachusetts law, of the defendant to the plaintiff. The question then becomes, considering the status of defendant (law enforcement agency) and that of the plaintiff (subject of investigation) what would the reasonable law enforcement agency have done under the circumstances? The answer, it seems to me, with respect to the suspected crime instrument, is that the reasonable law enforcement agency would subject it to tests. If it were a gun, test firing might take place. If it were the remnants of a poison and the nature of it was subject to question, it would be subjected to chemical tests, even if those tests resulted in its destruction. There was no "negligent" type of conduct here, in the sense of failure to exercise reasonable care under the circumstances. If anything, there was a deliberate act. In the light of this conclusion (applicable to Count I) Count II (based on alleged negligent failure to "exercise supervisory obligations to prevent the negligent, careless or reckless destruction of the generator") must fall also.

Reference has been made, in the brief by plaintiff, to "Tort Law", a volume by Justice Joseph Nolan of the Supreme Judicial Court, one of the works in the Massachusetts Practice Series from West Publishing Company, as authority for the proposition that what was done by the F.B.I. to the generator constituted negligence. Justice Nolan writes, however, that "Negligence cannot be discussed in a vacuum." § 172. He gives illustrations, many from the Restatement, emphasizing the importance of the relationship of the actor to another (parent to child, landowner to trespassing child, one in charge of another who is helpless, etc.). A telling phrase appears in section 173 wherein he writes, concerning negligence: "It is *a*

want of diligence (emphasis supplied) commensurate with the requirement of the duty at the moment imposed by law". A negligent act may, of course, be an intentional act in itself, but to constitute negligence, it must be characterized by a lack of diligence in the performance of duty—an act which creates an *unreasonable risk of harm.* "Liability is founded on unreasonable risk taking". At § 174. This governmental action was deliberate, subjecting plaintiff's property to testing. There was no "creation of a risk"—but a studied dismantling of the object.

If there be a similarity between this case and another, that other is *Porter* v. *United States,* 473 F.2d 1329 (5th Cir., 1973). In *Porter,* at page 1336: "We consider first the claim with regard to the damage, in the form of staining and discoloration, to some of the documents handled by the FBI. Properly framed, the question posed by her claim (the widow of Lee Harvey Oswald) is as follows: 'If the government had not taken the particular property on November 1, 1966, but instead had returned it to Mrs. Porter, would the government have been monetarily liable for such damage?' We think not. Under the circumstances of this case, we think that the sort of damage complained of does not of itself amount to an implied taking for which compensation would be constitutionally required. (T)he claimant's recourse, if any, must be found in the Federal Tort Claims Act. Even so, the claim must fail. While reserving judgment as to the question whether an individual whose property has been negligently damaged by the FBI in the course of an investigation can recover under the Tort Claims Act, we think it evident at the very least that Mrs. Porter cannot. . . *Absent, as here, any proof* or even allegation *that the damage was due to negligence,* it must be assumed that the agents of the FBI responsible for damaging the documents were properly carrying out their appointed functions". (Underlining by author.) If the conduct of the agents in the *Porter* case could not be characterized as "negligence", neither can the conduct of the F.B.I. in the case at bar. There is nothing to indicate that the F.B.I. here was doing anything other than carrying out its statutory duty under 28 U.S.C. § 533 with due care. The instant claim, therefore, is barred by the exception defined in 28 U.S.C. § 2680(a).

Finally, there is no evidence that the F.B.I. took any step that was unreasonable, unnecessary or excessive. The machine had to be taken apart to find out what made it "tick".

Plaintiff's motion for summary judgment is denied. Defendant's motion is allowed. Judgment for the defendant.

John J. McNaught

John J. McNaught
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HYDROGEN TECHNOLOGY CORP., *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	**Civil Action No. 85-2073-Mc**

JUDGMENT

March 26, 1987

Mc NAUGHT, D.J.

In accordance with my Memorandum and Order on Cross Motions for Summary Judgment issued this day,

JUDGMENT FOR THE DEFENDANT.

SO ORDERED.

John J. Mc Naught
United States District Judge